

# THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN PROMOTING HORIZONTAL POSITIVE OBLIGATIONS OF THE STATE

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**Summary:** Over the last forty years the concept of the horizontal positive obligations of the State Parties to the European Convention on Human Rights has been developing in a number of cases of the European Court of Human Rights. This concept extends the protection of Convention rights and freedoms to horizontal relations, that is, to the relations between two private parties. However, the Convention on Human Rights can be violated only by the State; the violation by private parties is not possible, as private parties are not parties to the Conventions. Therefore, the only way to challenge a violation of Convention rights committed by private parties is to link this action to an act or omission of the State, and to claim that the State is responsible for it. This, in turn, requires demonstrating that the Convention obliges the State to protect one individual's Convention rights from violations committed by other individuals. The State has a wide margin of appreciation as to how it discharges the obligation to protect Convention rights against violations by private individuals.

**Keywords:** European Court of Human Rights, European Convention on Human Rights, positive obligations of the State, horizontal relations

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## 1 Introduction

Under the European Convention on Human Rights, in a number of cases over the last forty years, the European Court of Human Rights (ECtHR) has been developing the concept of the horizontal positive obligations of the State.<sup>1</sup> In line with this concept, State authorities are obliged to intervene in horizontal relations, that is, in the relations between two private parties<sup>2</sup>, to the advantage

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- 1 The writing of this paper was supported by the Polish National Science Centre (research project No DEC-2013/11/B/HS5/03711). I would like to thank Professor Krzysztof Wojtyczek, a Judge of the European Court of Human Rights, for his comments on earlier drafts of this paper. Part of the paper was presented at the ICON-S 2017 Annual Conference in Copenhagen.
  - 2 On the specificity of horizontal relations see: FLORCZAK-WĄTOR, Monika. *Horyzon-*

of the weaker party, and, at the same time, to the disadvantage of the stronger one. Undoubtedly, the limits of State interference in horizontal relations must be set in such a way that they meet both the requirement of respecting the individual's rights and that of protecting them. In other words, an individual must be given autonomy, the power to decide about himself, but at the same time, efficient protection of his rights must be guaranteed. Therefore, one may distinguish between substantive and procedural positive obligations of the State.<sup>3</sup> The implementation of the former requires balancing the values underlying the colliding rights and freedoms.

Although the authors of the European Convention on Human Rights did not intend it to cover private relations,<sup>4</sup> the ECtHR has employed a variety of methods to apply the Convention to the relations between private parties. In ensuring respect for the principle of enforcing "practical" and "effective" rights, the scope of many of the Convention's provisions has been extended by the ECtHR to carry implications relevant for private parties.

The aim of my paper is to provide an overview of the ECtHR's positive obligations' case law. However, I would like to go beyond the descriptive level and to provide an in-depth analysis of the application of the concept of positive obligations of the State in various types of law practice in order to identify some general principles for dealing with these issues from the case law of the ECtHR.

## **2 From the idea of protecting rights against State measures to the idea of protecting rights through State measures**

After World War II, the European Convention on Human Rights was prepared in the belief that the greatest threats to an individual resulted from actions of the State and its authorities. This belief was finally reflected in the text of the Convention. Pursuant to its provisions, State Parties to the Convention were obligated not to take any measures intended to thwart the rights and liberties listed in it, or to limit them to a greater extent than envisaged in the Convention.

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*talny wymiar praw konstytucyjnych*. Cracow: Jagiellonian University Press, 2014, p. 33–43.

3 LAVRYSEN, Laurens. *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Cambridge-Antwerp-Portland: Intersentia, 2016, p. 50–53.

4 DRZEMCZEWSKI, Andrew. The European Human Rights Convention and Relations between Private Parties, *Netherlands International Law Review*, 1979, vol. 26, p. 168; ALKEMA, Evert Albert. *The Third-party Applicability or "Drittwirkung" of the European Convention on Human Rights*. In MATSCHER, Franz, PETZOLD, Herbert (eds.). *Protecting Human Rights: The European Dimension, Studies in Honour of Gerard J. Wiadra*. Köln-Berlin-Bonn-München: CarlHeymanns Verlag KG, 1988, p. 36; GARLICKI, Lech. Relations between Private Actors and the European Convention on Human Rights. In SAJÓ, András, UITZ, Rita (eds.). *The Constitution in Private Relations: Expanding Constitutionalism*. Utrecht: Eleven International Publishing, 2005, p. 130; URBAITE, Lina. Judicial Activism in the Approach of the European Court of Human Rights to Positive Obligations of the State, *Baltic Yearbook of International Law*, 2011, vol. 11, p. 214.

Originally, negative obligations were imposed on the States, first and foremost so as not to violate the Convention rights.

Several decades of development of the Council of Europe, whose main aim has been to promote the principles of democracy and respect for human rights, have strengthened trust in the State Parties to the Convention associated with this organization.<sup>5</sup> They ceased to be perceived as the main threat to human rights, and the bar started to rise in terms of what was expected of them. With time came the recognition that it was not the State but private parties that posed the biggest threat to individuals' rights and duties enshrined in the Convention.<sup>6</sup> Nowadays, in a democratic State ruled by law, it is usually private parties that kill individuals, interfere with their private and family life, limit their freedom to express opinions, and disrupt peaceful assemblies. Consequently, an expectation took root that State Parties to the Convention would protect the rights of individuals against the actions of other individuals. Thus, as Andrew Clapham observes, the European Convention on Human Rights replaced the idea of protecting the individual against State measures with the idea of protecting the individual through State measures.<sup>7</sup>

### 3 The legal basis of State's positive obligations

Nowadays, the positive obligation of the State is inferred from the Convention on Human Rights as a general one, or as a specific obligation accompanying a specific right or freedom.

The general obligation is formulated on the basis of Article 1 of the Convention. This provision obliges the State Parties to secure the rights and freedoms defined in the Convention for everyone within their jurisdiction. As the ECtHR pointed out in the case *Assanidze v. Georgia*,<sup>8</sup> "it follows from Article 1 of the Convention that the States Parties are answerable for any violation of the protected rights and freedoms of anyone within their 'jurisdiction' — or competence — at the time of the violation." The ECtHR indicates that the duty to "secure" is not exhausted by the obligation "not to obstruct" or "not to interfere", but also includes the obligation to take measures to secure Convention rights and free-

5 As is emphasized by some authors, „Human rights became a measuring stick for the evaluation of the countries' democratic nature and its commitment to the concept of rule of law". See: KERIKMÄE, Tanel, HAMULÁK, Ondrej, CHOCHIA, Archil, *A Historical Study of Contemporary Human Rights: Deviation or Extinction?*, *Acta Baltica Historiae et Philosophiae Scientiarum*, 2016, vol. 4, no. 2, p. 100.

6 XENOS, Dimitris. *The Positive Obligations of the State under the European Convention of Human Rights*, London-New York: Routledge, 2012, p. 2.

7 CLAPHAM, Andrew. The "Drittwirkung" of the Convention. In MACDONALD, Ronald Saint John, MATSCHER, Franz, PETZOLD, Herbert (eds.), *The European System for the Protection of Human Rights*. Dordrecht-Boston-London: Martinus Nijhoff Publishers, 1993, p. 190.

8 Judgment of 8 April 2004, Application No. 71503/01.

doms. These may be both measures that serve to fully realize Convention rights (e.g. by regulating the principles of adoption), and measures that serve to organize national procedures to provide protection to persons whose Convention rights have been violated (e.g. prompt and efficient investigation). Both cases concern States' obligation to pass legislation, which is a typical positive obligation. If the given Convention right may be realized only within a certain normative framework and the State fails to provide this framework, then its omission is a violation of the Convention.

Yet, positive obligations of the State are also inferred from the provisions that formulate particular rights and freedoms, by means of a broadening interpretation of their scope, e.g. the notion of "respect" in the case of the right to privacy, formulated in Article 8 of the Convention.<sup>9</sup> As the ECtHR pointed out in the case of *Marckx v. Belgium*, "By proclaiming in paragraph 1 the right to respect for family life, Article 8 (art. 8–1) signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2 (...). Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life." The Court stresses that those positive obligations are implied in the Convention, while interpretation is simply a way to decode them.<sup>10</sup> In legal science, the inherence theory is spoken of in this context.

The ECtHR reconstructs the positive obligations of the State also via a combination of Article 1 of the European Convention on Human Rights and the standard-setting provisions of the Convention. Thus, taking as an example the freedom of expression formulated in Article 10 of the Convention, one may observe that the obligation to take necessary measures to protect this freedom is drawn by the ECtHR from Article 10 in conjunction with Article 1 of the Convention on Human Rights.<sup>11</sup>

However, in recent case law there is a new tendency whereby the ECtHR derives the positive obligations of the State solely from the standard-setting provisions of the Convention, without any reference to its Article 1. Therefore, at the present time, the aforementioned positive obligation of the State to secure for the applicant his right to respect for his family life is educed by the ECtHR directly from Article 8 of the Convention.<sup>12</sup>

9 AKANDJJ-KOMBE, Jean-François. Positive Obligations under the European Convention on Human Rights. A Guide to the Implementation of the European Convention on Human Rights, *Human Rights Handbook*, 2007, p. 8; XENOS, Dimitris. *The Positive Obligations...*, p. 92

10 See judgment of 21 February 1975 in the case *Golder v. United Kingdom*, Application No. 4451/70 and the judgment of 10 November 2005 in the case *Leyla Sahin v. Turkey*, Application No. 44774/98.

11 AKANDJJ-KOMBE, Jean-François. *Positive Obligations ...*, p. 8

12 See: judgments: of 7 November 2017 in the case *Egill Einarsson v. Iceland*, Application No.

#### 4 State's positive obligations in horizontal relations

The conception of positive obligations of the State in horizontal relations appeared in ECtHR case law in the second half of the 1980s and owes its success to having been consistently promoted by this body. It also demonstrates that the Convention on Human Rights is a “living instrument” that catches up with the demands of the changing reality.<sup>13</sup> New sources of threats to Convention rights and freedoms require the State Parties to use new and adequate measures. Therefore, the conception in question extends the protection of Convention rights and freedoms to relations between private parties. However, the latter are not the “High Contracting Parties” in the meaning of Article 1 of the Convention. Private individuals can be entitled to submit an application to the ECtHR as victims of violations of Convention rights. Pursuant to Article 34 of the Convention on Human Rights, “The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.” The in-depth analysis of this provision leads to the conclusion that it is not only individuals who can be deemed victims of violations of Convention rights, but also nongovernmental organizations or groups of individuals. However, indicating the entity that is the victim under the Convention is not as controversial as indicating the entity that is obliged to respect human rights. Generally speaking, in vertical relations, human rights are violated by the State and its authorities, while in horizontal relations, these rights are violated by private parties that are usually in no way linked to the State. However, the Convention on Human Rights and its provisions can be violated only by the State; the violation by private parties is not possible, as private parties are not parties to the Convention.

Therefore, from a practical point of view, the conception of the State's protective duties in horizontal relations is an answer to the significant procedural restrictions resulting from the Convention. Pursuant to its Article 33 and Article 34, an application to the ECtHR can be filed only against a State being a “High Contracting Party.” A private entity is not a party to the Convention, hence no action of this entity can be challenged directly in proceedings before the ECtHR.<sup>14</sup> The only way to challenge a violation of Convention rights (but not

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24703/15; of 3 October 2017 in the case *Vilenchik v. Ukraine*, Application No. 21267/14; of 3 October 2017 in the case *Silva and Mondim Correia v. Portugal*, Application Nos. 72105/14 and 20415/15.

- 13 GARLICKI, Lech. *Relations between Private Actors ...*, p. 130; BARKHUYSEN, Tom, VAN EMMERIK, Michiel. *Constitutionalisation of Private Law: The European Convention of Human Rights Perspective*. In BARKHUYSEN, Tom, LINDENBERGH Siewert (eds.). *Constitutionalisation of Private Law*. Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 53.
- 14 DRZEMCZEWSKI, Andrew. *The European Human Rights ...*, p. 177; ALKEMA, Evert Albert. *The Third-party Applicability...*, p. 38; POLAKIEWICZ, Jörg. *The Implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Field of Private Law*, *Tel Aviv University Studies in Law*, 1994, vol. 12, p. 87;

a violation of the Convention itself) committed by a private entity is therefore to link this action to an act or omission of the State, and to claim that the State is responsible for it.<sup>15</sup> This, in turn, requires demonstrating that the Convention provides for yet another positive obligation from the State; namely, obligation to protect one individual's Convention rights from violations committed by other individuals.

## 5 Justification of the horizontal operation of Convention rights

In order to answer the aforementioned question whether the Convention on Human Rights actually provides for any duties for private entities, we should primarily analyze how the particular rights and freedoms of an individual are defined in the Convention.

This analysis leads to the conclusion that although the Convention, as such, can be violated only by the State, the vast majority of Convention rights and freedoms can also be violated in practice by private parties. This group includes, without limitation, the right to privacy (Article 8), freedom of thought, conscience, and religion (Article 9), freedom of expression (Article 10), or freedom of assembly and association (Article 11). Apparently, the Convention also includes the rights that only apply in vertical relations, that is, the relations between the individual and the State. Examples include the right to a fair trial (Article 6), the principle of no punishment without law (Article 7), the right to an effective remedy (Article 13), or the principle that an alien lawfully resident in the territory of a State Party cannot be expelled (Article 1 of Protocol No. 7 to the Convention). This means that the horizontal application of a Convention right has to result first and foremost from its nature and from the way in which it is defined in the text of the Convention.

Arguments to justify the horizontal operation of Convention rights can also be found in more general provisions of the Convention.

Pursuant to Article 17 of the Convention, none of its provisions “may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” This provision also expressly lists, along with States, persons or groups of persons whose actions may destroy Convention rights or freedoms or limit them beyond the permitted extent. Thus, it can be the grounds for formulating the statement that Convention rights have a horizontal application. In turn, Article 13 of the Convention provides that “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective rem-

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BARKHUYSEN, Tom, VAN EMMERIK, Michiel. *Constitutionalisation of Private Law...*, p. 47–48.

15 GARLICKI, Lech. *Relations between Private Actors ...*, p. 130.

edy [...] notwithstanding that the violation has been committed by persons acting in an official capacity.” The conclusion we can draw from the final part of this provision is that violations of Convention rights and freedoms can also be committed by persons who do not act in an official capacity and thus that the right to an effective remedy should then apply to an even greater extent.<sup>16</sup> Moreover, it is worthwhile observing that in the light of Article 8–11 of the Convention, the right to respect for private and family life, freedom of thought, conscience, and religion, freedom of expression, and freedom of assembly and association may be limited, e.g. to protect the rights and freedoms of others. Consequently, an individual should consider the rights and freedoms of others (including those enshrined in the Convention) at least to the same extent to which they restrain that individual’s rights and freedoms.

Apart from the normative justification of the positive obligations of the State in horizontal relations, it is worthwhile mentioning the existence of the factual justification, referring to the purpose and essence of the Convention on Human Rights. In this regard, the ECtHR invokes the principle of the effective protection of Convention rights and the principle of developing the protection of those rights in a way that is tailored to address contemporary needs and threats. As for the former principle, it was stressed in the case *Airey v. Ireland* that “The Convention on Human Rights is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”<sup>17</sup> This means that the protection guaranteed for the Convention rights should be comprehensive, that it should cover all possible threats, regardless of whether their source is the State or private parties.<sup>18</sup> In the context of the second principle, the ECtHR argues that “the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions.”<sup>19</sup> This means that, when interpreting the Convention, the ECtHR takes into account new sources of threats to the rights and freedoms of the individual posed by socioeconomic changes, and scientific and technological advances, as well as the new standards of their protection, formulated in national and international law.<sup>20</sup> This approach is also found in the Preamble of the Convention, which provides that one of the ways in which

16 ALKEMA, Evert Albert. *The Third-party Applicability ...*, p. 36–37; SPIELMANN, Dean. The European Convention on Human Rights. The European Court of Human Rights. In OLIVER, Dawn, FEDTKE Jörg (eds.). *Human Rights in the Private Sphere. A Comparative Study*, New York: Routledge-Cavendish, 2007, p. 432. However, the interpretation of Article 13 of the European Convention on Human Rights presented by these authors is contested by Jörg Polakiewicz. See more: POLAKIEWICZ, Jörg. *The Implementation of the European Convention ...*, p. 186.

17 Judgment of 9 October 1979, Application No. 6289/73.

18 ZWAAK, Leo. General Survey of the European Convention. In VAN DIJK, Pieter, VAN HOOE, Fried, VAN RIJN Arjen, ZWAAK Leo (eds.). *Theory and Practice of the European Convention on Human Rights*, Antwerpen-Oxford: Intersentia, 2006, p. 31.

19 Judgment of 25 April 1978, Application No. 5856/72.

20 MORAWSKA, E. H. *Zobowiązania pozytywne państw-stron Konwencji o ochronie praw człowieka i podstawowych wolności*, Warszawa: 2016, p. 91



to achieve greater unity among members of the Council of Europe is “the maintenance and further realization of Human Rights and Fundamental Freedoms.” Protection requires responding to ever-new threats, while the development of human rights justifies extending the scope of their protection, by also including positive obligations being imposed on the State Parties to the Convention.

The horizontal application of Convention rights is also confirmed by the case law of the ECtHR, according to which the applicants can be refused protection if they themselves violate the Convention rights of other people. This case law has been developed pursuant to Article 35 sec. 3 of the Convention providing that “The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application.” The applicant’s failure to respect Convention rights obliged the ECtHR to reject his or her applications as inadmissible according the aforementioned provision of the Convention.<sup>21</sup>

As an example of this kind of ECtHR decision, one can mention the decision issued in the case *Glimmerveen and Hagenbeek v. Netherlands*.<sup>22</sup> The case concerned the president of a nationalist party who called for non-white people and guest workers to be expelled from the country, which eventually led to his conviction for inciting racial hatred. In the proceedings before the ECtHR, he claimed that Dutch authorities violated his freedom of speech guaranteed by Article 10 of the Convention. The application was, however, considered inadmissible because the Convention on Human Rights prohibits racial discrimination. As the Commission held, “The applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are, as shown above, contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms referred to above. No person who violates the principle of non-discrimination can invoke Convention rights. Consequently, the Commission finds that the applicants cannot, by reason of the provisions of Article 17 of the Convention, rely on Article 10 of the Convention.”

This statement of the Commission, that no person who violates the principle of non-discrimination can invoke Convention rights, has been confirmed by the ECtHR in the case *Garaudy v. France*.<sup>23</sup> The Court pointed out that “where the right to freedom of expression was relied on by applicants to justify the publication of texts that infringed the very spirit of the Convention and the essential val-

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21 For the first time, this idea was presented in the decision of the European Commission of Human Rights of 20 July 1957 on the admissibility of Application No. 250/57 lodged by the German Communist Party, dissolved by decision of the Federal Constitutional Court of 17 August 1956.

22 Decision of 11 October 1979, Application Nos. 8348/78, 8406/78.

23 Decision of 23 June 2003, Application No. 65831/01.



ues of democracy, the Commission had always had recourse to Article 17 of the Convention, either directly or indirectly, in rejecting their arguments and declaring their applications inadmissible. The Court had subsequently confirmed that approach.”

## 6 The level of protection against private action

Accepting the view that the Convention can be the source of obligations not only for the State but also for private entities does not mean that the scope of these obligations and their character is the same in vertical and horizontal relations. It should be stressed that in the light of Article 1 of the Convention, only the State Parties to the Convention are obligated to “safeguard” Convention rights. This duty could not be extended or, all the more so, transferred to private parties, because it would be a violation of the aforementioned provision. The obligations borne by private parties can only be of a negative character. They have to refrain from actions intended to destroy the Convention rights and freedoms of other persons or limit them to a greater extent than provided for in the Convention (Article 17 of the Convention). Therefore, only obligations of a negative nature are common for States and private parties. Positive obligations under the Convention are reserved solely for State authorities.

However, the assumption that the Convention on Human Rights establishes negative duties for both States and private parties does not mean that the level of protection against a private action is the same as the level of protection against State action. The problem was pointed out by judge Lech Garlicki in a dissenting opinion to the judgment in the case *Pla and Puncernau v. Andora*.<sup>24</sup> As he held, “The very fact that, under the Convention, the State may be prohibited from taking certain action (...) does not mean that private persons are similarly precluded from taking such action. In other words, what is prohibited for the State need not necessarily also be prohibited for individuals. Of course, in many areas such prohibition may appear necessary and well-founded. However, it should not be forgotten that every prohibition of private action (or any refusal to judicially enforce such action), while protecting the rights of some persons, unavoidably restricts the rights of other persons. This is particularly visible in regard to ‘purely’ private-law relations, such as inheritance.” L. Garlicki’s view was shared by judge Nicolas Bratza, who also submitted a partly dissenting opinion in the case *Pla and Puncernau v. Andora*. He stressed that private parties, unlike State authorities, can sometimes apply discrimination in their activities, for instance, when they use their property. As he noticed in reference to the circumstances of the case, “It must in principle be open to a testator, in the exercise of his or her right of property, to choose to whom to leave the property and, by the terms of the will, to differentiate between potential heirs, by (*inter alia*) distinguishing between biological and adoptive children and grandchildren (...). The State

24 Judgment of 13 July 2004, Application No. 69498/01.

must in principle give effect, through its judicial organs, to such private testamentary disposition and cannot be held to be in breach of its Convention obligations (including its obligations under Article 14) by doing so, save in exceptional circumstances where the disposition may be said to be repugnant to the fundamental ideals of the Convention or to aim at the destruction of the rights and freedoms set forth therein. This remains true even if there may appear to be no objective and reasonable justification for the distinction made by a testator.”

## **7 The development of the doctrine of State protective obligations in the case law of the ECtHR**

The success of the conception of State protective duties already comprises a few dozen judgments; too many to list here, let alone describe, even very briefly. It is, however, worthwhile looking at the judgments from which the development of this conception started and to which the ECtHR constantly makes references.<sup>25</sup>

The first one was the judgment in the case *Young, James and Webster v. United Kingdom*.<sup>26</sup> The application to the ECtHR originated in a dispute between the applicants and their employer (a private railway enterprise). The latter entered into an agreement with three trade unions, providing that each employee had to declare membership of one of those unions. The applicants refused to join a union and for this reason they were dismissed. The then-applicable UK law did not prohibit this kind of agreement between employers and trade unions, so the applicants submitted that the UK authorities violated their freedom of association. The Court held that in certain cases, the State's positive obligation may also consist in protecting the Convention rights and freedoms of the individual by making unlawful such actions of private persons that infringe said rights or freedoms. In other words, the State will be liable for violations of Convention rights by private persons if it maintains legislation that permits such violations. Consequently, although the Convention freedom of association was violated by a private employer, it was the UK that was made liable for the lack of legislation to make such actions unlawful.

The next step in the development of the doctrine of positive State obligations in the field of protecting Convention rights was the judgment in the case *X and Y v. Netherlands*.<sup>27</sup> Here, the ECtHR ruled that the Netherlands violated the applicants' right to respect for their private and family life (Article 8 of the Convention), because the Dutch criminal law made it impossible to prosecute the man

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25 In my further reflections, I use the examples of cases presented in my previously published article. See FLORCZAK-WĄTOR, Monika, Pozytywne obowiązki państwa w zakresie ochrony praw konwencyjnych jednostki, *Przegląd Naukowy Disputatio*, 2010, vol. XI, pp. 320–323.

26 Judgment of 18 October 1982, Application Nos. 7601/76, 7806/77.

27 Judgment of 26 March 1985, Application No. 8978/80.

who raped a 16-year-old mentally disabled girl. Pursuant to the Dutch law, the complaint could only be lodged by the victim, and since she had no legal capacity, no criminal proceedings could be initiated. The ECtHR held that “although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (...). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.” The State has a certain margin of appreciation in how it chooses to secure such protection; in particular, criminal sanctions are not the only means through which to guarantee attaining this goal. However, in this specific case, the Court held that the regulations on criminal procedure that were lacking were necessary, because this lack posed a threat to fundamental values and important aspects of private life. For this reason, it found a violation of Article 8 of the Convention by the Dutch authorities.

The doctrine of positive State obligations in horizontal relations was also developed in cases concerning the legal protection of life. Article 2 of the Convention expressly places a substantive positive obligation on the State Parties, that is the obligation to protect life by law. According to constant case-law of the ECtHR, this provision enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The ECtHR stated that Article 2 of the Convention entailed, on the one hand, an obligation for the State to adopt adequate criminal sanctions for a person guilty of unlawful killing, and, on the other hand, an obligation to ensure efficient investigation in such cases. This view was expressed in a judgment issued in 2003, in the case *Menson and Others v. United Kingdom*,<sup>28</sup> which concerned the killing of a black man by four white youths. Two years after the event, the perpetrators were arrested, accused, and they finally received sentences. The applicants complained that the UK had violated Article 2 of the Convention by failing to comply with the obligation to carry out a proper and comprehensive investigation intended to establish the killers and the circumstances of the killing. The Court stressed that the State could not have any direct responsibility for the death, because it could not have foreseen the killing, nor could it have taken preventive steps to protect the victim. However, this did not make it impossible to find another violation of Article 2.1 of the Convention by the State. What follows from this provision, according to the Court, is the State’s obligation to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression, and punishment of breaches of such provisions. The Court pointed out that “while there may be obstacles or difficulties which prevent progress in an investigation in a particular

28 Decision of 6 May 2003, Application No. 47916/99.

situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.” The in-depth analysis of this decision leads us to the conclusion that where racially-motivated killing is involved, the investigation should be particularly efficient. Although in the case *Menson and Others v. United Kingdom* the pace of investigation could give rise to certain doubts, eventually it did prove efficient, because the culprits were arrested and convicted. For this reason, the Court did not find the UK to be in breach of Article 2 of the Convention.

Later, the ECtHR developed the doctrine of positive State obligations in horizontal relations in cases concerning freedom of expression (Article 10 of the Convention). In the case *Appleby and Others v. United Kingdom*,<sup>29</sup> the owner of a private shopping mall prohibited the applicant from setting up a stand used for political canvassing. The applicant claimed that the State had an obligation to secure his freedom of expression of political views. The ECtHR stated that “Genuine, effective exercise of this freedom does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (...). In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.” In the aforementioned case, *Appleby and Others v. United Kingdom*, the Court found that the applicant had other opportunities for political canvassing. Hence, having regard to the need to balance the interests of both parties (the applicant and the mall owner) and the degree to which freedom of expression was restricted, the ECtHR did not find any breach of the positive obligations by the State.

The most frequent reason why States are found to be in breach of positive obligations in the area of the protection of the Convention rights of an individual is because they fail to issue a certain regulation or omit a question that should be regulated in it. The doctrine of positive State obligations is not, however, merely limited to obligations to enact or amend laws.<sup>30</sup> Authorities applying the law, that is, courts and administrative bodies, also have to ensure, in their activity, respect for Convention rights and freedoms. The ECtHR often found that Convention rights had been violated by a court or administrative body, even though

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29 Judgment of 6 May 2003, Application No. 44306/98.

30 POLAKIEWICZ, Jörg, *The Implementation of the European Convention ...*, p. 192

the actual violation was committed by a private individual. As an example, in this regard, we can mention a judgment issued in 2000 in the case *Ignaccolo-Zenide v. Romania*,<sup>31</sup> which concerned a so-called parental abduction. The mother submitted that there had been a violation of Article 8 of the Convention because she was unable to exercise the court-granted custody of the child. The ECtHR found her objection reasonable and held that Romanian authorities failed to take proper and effective steps to enable the applicant to enforce her right to be reunited with the child and had therefore violated her right to respect for family life. As the ECtHR pointed out, “the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in an effective ‘respect’ for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.”

## 8 Conclusion

The doctrine of positive State obligations in the area of the protection of Convention rights both strengthened and significantly extended the application of the European Convention on Human Rights. Horizontal relations, which previously seemed to be irrelevant from the point of view of the Convention, suddenly, at least partially, were covered by its sphere of influence. Additionally, the scope of responsibility of State Parties was extended when it was stated that the grounds on which they are found to violate Convention rights and freedoms may include not only acts or omissions by State authorities, but also those of private individuals within the jurisdiction of State Parties.

Therefore, the outcome of the adoption of the doctrine of positive State obligations in horizontal relations has been the extended responsibility of States for violations of Convention freedoms beyond the traditional vertical relations. An assessment of the degree of discharge of positive State obligations in the sphere of protecting Convention rights largely depends on the efficiency of measures taken by State authorities. However, it must be emphasized that these measures are not limited to the sphere of enacting laws, but also to that of applying them. What still remains problematic and will have to be further clarified in the case law of the ECtHR is the limits of such protective obligations. There is no doubt that the State cannot be held responsible for each violation of Convention rights by a private party. Moreover, the State has a wide margin of appreciation as to how it discharges the obligation to protect Convention rights against violations by private individuals. As the Court pointed out in the case *Powell and Rayner v. the United Kingdom* in the context of Article 8, “Whether the present case be analyzed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants’ rights under paragraph 1 of Article 8

31 Judgment of 25 January 2000, Application No. 31679/96.

(Art. 8–1) or in terms of an ‘interference by a public authority’ to be justified in accordance with paragraph 2 (Art. 8–2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.”

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